

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

TOMASA ZABALZA

Plaintiff,

v.

PINNACLE FINANCIAL CORPORATION;  
et al.,

Defendants.

3:11-cv-0283-LRH-VPC

ORDER

Before the court is defendants Ticor Title of Nevada (“Ticor Title”) and Stanley S. Silva’s (“Silva”) motion to dismiss (Doc. #6<sup>1</sup>) to which defendants LSI Title Company (“LSI”) and Quality Loan Service Corporation (“QLS”) joined (Doc. #7).

Also before the court is defendants America’s Servicing Company (“ASC”) and Mortgage Electronic Registration Systems, Inc.’s (“MERS”) motion to dismiss. Doc. #16.

**I. Facts and Procedural History**

In September, 2006, plaintiff Tomasa Zabalza (“Zabalza”) purchased real property through a mortgage note and deed of trust originated by defendant Pinnacle Financial Corporation. Eventually, Zabalza defaulted on the mortgage note and defendants initiated non-judicial foreclosure proceedings.

<sup>1</sup> Refers to the court’s docket entry number.

1 Subsequently, Zabalza filed a complaint in state court against defendants alleging nine  
2 causes of action: (1) violation of state debt collection laws, NRS 649.370; (2) Nevada Unfair and  
3 Deceptive Trade Practices Act, NRS 598.0923; (3) Nevada Unfair Lending Practices Act,  
4 NRS 598D.100; (4) breach of the covenants of good faith and fair dealing; (5) violation of state  
5 recording laws, NRS 107.080; (6) quiet title; (7) fraud in the inducement; (8) slander of title; and  
6 (9) abuse of process. Doc. #1, Exhibit A. Thereafter, moving defendants filed the present motions  
7 to dismiss. Doc. ##6, 16.

## 8 **II. Legal Standard**

9 Defendants seek dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure  
10 to state a claim upon which relief can be granted. To survive a motion to dismiss for failure to state  
11 a claim, a complaint must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading  
12 standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). That  
13 is, a complaint must contain “a short and plain statement of the claim showing that the pleader is  
14 entitled to relief.” Fed. R. Civ. P. 8(a)(2). The Rule 8(a)(2) pleading standard does not require  
15 detailed factual allegations; however, a pleading that offers “‘labels and conclusions’ or ‘a  
16 formulaic recitation of the elements of a cause of action’” will not suffice. *Ashcroft v. Iqbal*, 129 S.  
17 Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

18 Furthermore, Rule 8(a)(2) requires a complaint to “contain sufficient factual matter,  
19 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* at 1949 (quoting  
20 *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the pleaded factual content allows  
21 the court to draw the reasonable inference, based on the court’s judicial experience and common  
22 sense, that the defendant is liable for the misconduct alleged. *See id.* at 1949-50. “The plausibility  
23 standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a  
24 defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a  
25 defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to  
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1 relief.” *Id.* at 1949 (internal quotation marks and citation omitted).

2 In reviewing a motion to dismiss, the court accepts the facts alleged in the complaint as  
3 true. *Id.* However, “bare assertions . . . amount[ing] to nothing more than a formulaic recitation of  
4 the elements of a . . . claim . . . are not entitled to an assumption of truth.” *Moss v. U.S. Secret*  
5 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 129 S. Ct. at 1951) (brackets in original)  
6 (internal quotation marks omitted). The court discounts these allegations because “they do nothing  
7 more than state a legal conclusion—even if that conclusion is cast in the form of a factual  
8 allegation.” *Id.* (citing *Iqbal*, 129 S. Ct. at 1951.) “In sum, for a complaint to survive a motion to  
9 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that content, must be  
10 plausibly suggestive of a claim entitling the plaintiff to relief.” *Id.*

### 11 **III. Discussion**

#### 12 **A. Debt Collection Violations**

13 Pursuant to NRS § 649, it is a violation of state law to violate any provision of the federal  
14 Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 et seq. NRS § 649.370. Here,  
15 Zabalza alleges that defendants violated the FDCPA by initiating a non-judicial foreclosure without  
16 following the proper procedures for attempting to collect a debt.

17 It is well established that non-judicial foreclosures are not an attempt to collect a debt under  
18 the Fair Debt Collection Practice Act and similar state statutes. *See e.g., Hulse v. Ocwen Fed. Bank*  
19 *FSB*, 195 F. Supp. 2d 1188 (D. Or. 2002); *Charov v. Perry*, 2010 U.S. Dist. LEXIS 65798 (D. Nev.  
20 2010) (holding that recording a notice of default is not an attempt to collect a debt because the  
21 borrower already consented to allow the foreclosure trustee to record the notice upon default).  
22 Therefore, the court finds that Zabalza fails to state a claim against moving defendants for violation  
23 of the FDCPA, and thereby NRS § 649.

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1           **B. Nevada Unfair and Deceptive Trade Practices Act**

2           Pursuant to NRS 598.0923 it is a deceptive trade practice to conduct business in the State of  
3 Nevada without all required state, county or city licenses. NRS 598.0923(1). Zabalza alleges that  
4 defendants violated the statute by recording the underlying notice of default without having a state  
5 business license.

6           Initially, the court notes that the allegations against moving defendants are conclusory  
7 allegations that offer nothing more than a formulaic recitation of the elements of a violation. As  
8 such, they are insufficient to state a claim upon which relief can be granted. *See Moss*, 572 F.3d  
9 969. Further, moving defendants did not need to be licensed to conduct business in the state of  
10 Nevada because foreclosing on real property is not an attempt to collect a debt requiring a separate  
11 license. *See Hulse*, 195 F. Supp. 2d 1188. Therefore, the court finds that Zabalza fails to state a  
12 claim upon which relief can be granted.

13           **C. Nevada Unfair Lending Practices Act**

14           NRS 598D.100 prohibits lenders from making loans “without determining, using  
15 commercially reasonable means or mechanisms, that the borrower has the ability to repay the home  
16 loan.” NRS 598D.100(1)(b). However, this suitability language was added in mid-2007 when the  
17 statute was amended. Although Zabalza alleges that defendants violated the present version of the  
18 statute, his loan originated in 2006, prior to the current amendment. Therefore, Zabalza’s loan  
19 cannot have violated the current statutory language requiring a determination that a borrower has  
20 the ability to repay the loan.

21           Additionally, Zabalza’s unfair lending practices claim is barred by the applicable statute of  
22 limitations. The statute of limitations on an unfair lending practices claim under NRS 598D is two  
23 (2) years. *See* NRS § 11.190(3)(a). Zabalza purchased the property in 2006, and did not file the  
24 present action until 2011, over three years after the statute of limitations had expired. Accordingly,  
25 the court shall grant moving defendants’ motions as to this issue.

1           **D. Breach of Good Faith and Fair Dealing**

2           Under Nevada law, “[e]very contract imposes upon each party a duty of good faith  
3 and fair dealing in its performance and execution.” *A.C. Shaw Constr. v. Washoe County*, 784  
4 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To establish a claim for  
5 breach of the implied covenant of good faith and fair dealing, a plaintiff must show that: (1) the  
6 plaintiff and defendant were parties to a contract; (2) the defendant owed a duty of good faith and  
7 fair dealing to the plaintiff; (3) the defendant breached his duty by performing in a manner  
8 unfaithful to the purpose of the contract; and (4) the plaintiff’s justified expectations were denied.  
9 *See Perry v. Jordan*, 134 P.3d 698, 702 (Nev. 2006) (citing *Hilton Hotels Corp. v. Butch Lewis*  
10 *Prod. Inc.*, 808 P.2d 919, 922-23 (Nev. 1991).

11           Here, there is no contract between Zabalza and moving defendants. The only contract is the  
12 mortgage contract between Zabalza and Pinnacle Financial Corporation. Thus, Zabalza fails to state  
13 a claim against moving defendants for breach of the covenants of good faith and fair dealing.

14           **E. NRS 107.080**

15           In his complaint, Zabalza alleges that defendants improperly foreclosed on his property  
16 because the promissory note was severed from the deed of trust and none of the defendants hold the  
17 original mortgage note. *See* Doc. #1, Exhibit A.

18           Nevada law does not require the production of the original note before one of the statutorily  
19 enumerated parties initiates a non-judicial foreclosure. *Weingarter v. Chase Home Finance, LLC*,  
20 702 F. Supp. 2d 1276, 1280 (D. Nev. 2010). Therefore, Zabalza fails to allege a claim upon which  
21 relief can be granted.

22           **F. Quiet Title**

23           Under Nevada law, a quiet title action may be brought by someone who claims an adverse  
24 interest in property. NRS § 40.010. Here, moving defendants do not claim any ownership interest in  
25 the property adverse to Zabalza. Therefore, Zabalza has no grounds to quiet title against moving  
26

1 defendants.

2 **G. Fraud**

3 “In alleging fraud or mistake, a party must state with particularity the circumstances  
4 constituting fraud or mistake.” FED. R. CIV. P. 9(b). In order to meet the heightened pleading  
5 requirements a plaintiff must specify the time, place, and content of the misrepresentation as well  
6 as the names of the parties involved. *See Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n.10 (9th  
7 Cir. 1999); *see also, Parnes v. Gateway 2000*, 122 F.3d 539, 549-50 (8th Cir. 1997) (requiring a  
8 plaintiff to allege the requisite who, what, where, when, and how of the misrepresentation).

9 Here, Zabalza fails to allege anything more than defendants defrauded him during the loan  
10 process. There are no allegations that moving defendants failed to provide information or what  
11 information was not provided. Further, Zabalza fails to specifically allege the requisite “time, place,  
12 and specific content of the false representation as well as the identities of the parties to the  
13 misrepresentations.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004). Therefore,  
14 the court finds that Zabalza’s allegations are insufficient to support his claim for fraud.

15 **H. Slander of Title**

16 A claim for slander of title “involves false and malicious communications, disparaging to  
17 one’s title in land, and causing special damages.” *Executive Mgmt., Ltd. v. Ticor Title Co.*, 963 P.2d  
18 465, 478 (Nev. 1998).

19 Here, the recorded notice of default and notice of trustee’s sale are not false and malicious  
20 communications disparaging Zabalza’s title. First, Zabalza concedes that he was in default on his  
21 loan. Thus the notice of default, although allegedly recorded before the substituted trustee was  
22 authorized to do so, does not make a false statement about his title to the property. Second, it is not  
23 false that the property was to be sold at a trustee’s sale. Therefore, the court finds that Zabalza has  
24 failed to state a claim for slander of title.

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1           **I. Abuse of Process**

2           To establish a claim for abuse of process a party must show that an opposing party (1) had  
3 an ulterior purpose for bringing a legal action other than resolving a legal dispute, and (2) used the  
4 legal process in a way that is not proper in the regular conduct of the proceeding. *Las Vegas Fetish*  
5 *and Fantasy Halloween Ball, Inc. v. Ahern Rentals*, 182 P.3d 764, 767 (Nev. 2008); *Georgiou*  
6 *Studio, Inc. v. Boulevard Invest, LLC*, 663 F. Supp. 2d 973, 982 (D. Nev. 2009).

7           Here, the court finds that Zabalza has failed to allege any facts demonstrating that  
8 defendants had an ulterior motive in initiating non-judicial foreclosure proceedings other than the  
9 resolution of his default on the mortgage note. Further, the process at issue in this action is a non-  
10 judicial foreclosure which is not the characteristic legal action contemplated by an abuse of process  
11 claim. *See e.g., Smith v. Wachovia Mortgage Corp.*, 2009 WL 1948829, \*5 (N.D. Cal. 2009).  
12 Therefore, the court finds that Zabalza has failed to state a claim for abuse of process. Accordingly,  
13 the court shall grant moving defendants' motions to dismiss.<sup>2</sup>

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15           IT IS THEREFORE ORDERED that defendants' motions to dismiss (Doc. ##6, 16) are  
16 GRANTED. Defendants Ticor Title of Nevada; Stanley S. Silva; LSI Title Company; Quality Loan  
17 Service Corporation; America's Servicing Company; and Mortgage Electronic Registration  
18 Systems, Inc. are DISMISSED as defendants in this action.

19           IT IS SO ORDERED.

20           DATED this 3rd day of November, 2011.



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22           \_\_\_\_\_  
LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE  
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24           <sup>2</sup> The court, in granting moving defendants' motions to dismiss, notes that Zabalza did not request leave  
25 to amend his complaint. However, even if he did request leave to amend, the court would deny the request  
26 because he has failed to make any showing that amendment in this particular case would not be futile or that  
he could overcome the identified pleading defects.